IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 568

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,

Petitioner,

v.

RCA COMMUNICATIONS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

JOHN W. DAVIS
15 Broad Street
New York 5, N. Y.

JAMES A. KENNEDY
JOHN F. GIBBONS
67 Broad Street
New York 4, N. Y.
Attorneys for Petitioner

BURTON K. WHEELER
RALPH M. CARSON
FRANCIS W. PHILLIPS
Of Counsel

New York, April 6 1953.

INDEX

TABLE OF CASES

PAGE

STATUTES

OTHER AUTHORITIES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

MACKAY RADIO AND TELEGRAPH COMPANY, INC., *Petitioner*, v. RCA COMMUNICATIONS, INC., *Respondent*.	No. 568

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion, decision and order of the Federal Communications Commission granting petitioner licenses to operate direct radiotelegraph circuits between the United States and The Netherlands and Portugal, dated February 21 1951 (R 550-654) and the opinion of the United States Court of Appeals for the District of Columbia Circuit rendered November 6 1952 and reversing, one judge dissenting, the Commission's decision (R 695-707) have not yet been reported.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was filed November 6 1952 (R 708). A petition for a writ of certiorari to review this judgment was filed by this petitioner January 26 1953 and was granted on March 16 1953. A petition for certiorari to review this judgment was also filed by the Federal Communications Commission and was granted on March 16 1953 in Case No. 567 entitled "Federal Communications Commission, Petitioner v. RCA Communications, Inc., Respondent". The jurisdiction of this Court rests upon Section 1254 of Title 28 of the United States Code, 62 Stat. 928, as provided in Section 402(j) of the Communications Act of 1934, as amended, 47 USC § 402(j)

Questions Presented

1. Did the Federal Communications Commission commit error of law in treating competition, where reasonably feasible, as a determinative element of the "public interest, convenience, or necessity" under the Communications Act of 1934?

2. Does the absence of specific findings that proposed radiotelegraph circuits will produce lower rates or speedier, superior, or more comprehensive service to the points involved, than that presently offered by another carrier, make it error as matter of law for the Federal Communications Commission to license new circuits to those points in the expressed belief that competition will provide incentive for the rendition of better service at lower cost?

3. Did the Court of Appeals, by affirming the Federal Communications Commission in its denial of a license for a competitive circuit, in the *Oslo* case in 1938 (*Mackay Radio & Telegraph Company* v. *FCC*, 97 F 2d 641) so fix the statutory criteria that the Commission cannot now license competitive circuits upon substantially similar, together with additional, basic findings?

4. Can the Court of Appeals, upon accepting as supported by the evidence all the basic findings of the Federal Communications Commission, properly substitute its judgment for that of the Commission in determining whether the "public interest, convenience, or necessity," is served by the licensing of radiotelegraph circuits?

Statutes Involved

The pertinent portions of the Communications Act of 1934, as amended, 47 USC § 151, *et seq.* and any other statutes relied upon by this petitioner, are set forth in the Appendix of this brief.

Statement of the Case

(a) Parties

Petitioner (hereinafter generally called Mackay) is a common carrier of international radiotelegraph communications and operates direct radiotelegraph circuits between the United States and many foreign countries (R 555, 562). It is a wholly-owned subsidiary of American Cable & Radio Corporation and is a sister company of (a) The Commer-

cial Cable Company which operates submarine cables across the North Atlantic and (b) All America Cables and Radio, Inc. which operates submarine cables between the United States and Latin America and international radio communication circuits in Colombia and Peru.

Respondent RCA Communications, Inc. (hereinafter called RCAC), which opposed Mackay's applications in the proceedings before the Federal Communications Commission, also is a common carrier of international radiotelegraph communications and operates direct radiotelegraph circuits between the United States and many foreign countries including The Netherlands and Portugal (R 558).

The Western Union Telegraph Company (hereinafter called Western Union) is engaged in both domestic and international communications by wire and submarine cable and provides international telegraph service between the United States and Canada, the Azores and various countries in the European area, including The Netherlands and Portugal. Although a party to the proceedings before the Commission it did not join in respondent's petition for a review of the Commission's decision.

(b) Proceedings Before the Commission

On May 29 1946 petitioner Mackay filed applications with the Federal Communications Commission for modification of license so as to establish direct radiotelegraph circuits with The Hague (later amended to Amsterdam), The Netherlands; Lisbon, Portugal; and Paramaribo, Surinam (R 551). Extensive hearings ensued in a consolidated proceeding on the three applications, which were participated in by Western Union and respondent RCAC herein. RCAC was at that time the only American company licensed to

operate direct radiotelegraph circuits to The Netherlands, Portugal, and Surinam (R 569, 583, 598). On February 21 1951 the Commission granted said applications of petitioner with respect to The Netherlands and Portugal, writing a lengthy opinion (R 550-631). Two of the Commissioners dissented (R 639-654).

The Commission's action, following an exhaustive examination of all the evidence, was founded upon its determination that the statutory standard "public interest, convenience, or necessity" would be served thereby.[1] At the same time and in the same proceeding the Commission denied the other application of Mackay to operate a circuit between the United States and Surinam, which action is not involved here. Mackay established the direct circuit with Portugal on March 12 1951, and with The Netherlands on June 21 1951, and they have since been and are now in regular operation.

(c) The Court of Appeals' Decision

RCAC appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. That Court, in a divided decision (two judges to one) on November 6 1952 reversed the Commission upon the ground that its finding that competition would be in the public interest was unwarranted in the face of a basic finding that Mackay's service over the new circuits would not be at lower rates or superior to existing service of RCAC (R 695-707). The Court was greatly influenced in this decision by its interpretation (concerning which the judges differed) of the significance of its own decision in the so-called *Oslo* case, viz. *Mackay Radio & Telegraph*

[1] 47 USC § 309(a), quoted in Appendix at page 45.

Company v. *Federal Communications Commission*, 97 F 2d 641. This case was decided in 1938 and affirmed a 1936 decision of the Commission based on evidence showing the international telegraph situation as it existed in 1935. Judge Edgerton wrote the opinion there as he did the majority opinion in the instant case.

The majority of the Court of Appeals, in reversing the decision and order of the Commission, left its findings intact. In fact, it assumed for the purposes of decision that competition with RCAC in handling direct radiotelegraph traffic would be "reasonably feasible" (R 698). The Court, in other words, came to a different determination concerning the "public interest, convenience, or necessity" from that reached upon the same findings of fact by the administrative body to which that determination has been committed by Congress.

Circuit Judge Prettyman, who dissented, stated that the Commission's findings are "ample support for the exercise of the judgment of the Commission that the presence of Mackay in the field will serve the public interest" (R 705).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In refusing to accept the weight accorded by the Commission to competition in radiotelegraph service, as a national public interest.

2. In substituting its judgment for that of the Federal Communications Commission with respect to the public interest, convenience, and necessity upon the same basic findings.

3. In misconstruing its earlier decision in *Mackay Radio & Telegraph Co. Inc.* v. *Federal Communications Commission*, 97 F 2d 641, and treating its then refusal to upset the administrative determination as warrant to interfere with a new administrative determination upon an amplified record.

Summary of Argument

1. The Court below erred, and its decision will have a permanent prejudicial effect upon federal communications regulation, in failing to recognize the vital public interest in the maintenance of competition.

2. The Court below erred in supplanting the discretion of the Federal Communications Commission upon findings not arbitrarily or capriciously made and based on substantial evidence.

3. The decision of the Federal Communications Commission did not contravene Section 314 of the Communications Act of 1934.[2]

[2]This question is not properly before this Court since it was not determined by the majority of the Court below and was not raised in either of the petitions for certiorari herein. However, respondent in its brief opposing certiorari (pp. 13-19) argued that the decision

ARGUMENT

POINT I

THE COURT BELOW ERRED, AND ITS DECISION WILL HAVE A PERMANENT PREJUDICIAL EFFECT UPON FEDERAL COMMUNICATIONS REGULATION, IN FAILING TO RECOGNIZE THE VITAL PUBLIC INTEREST IN THE MAINTENANCE OF COMPETITION.

A. Competition v. monopoly as a determinative element in the Commission's decision.

The applications of the petitioner Mackay, which are here involved, were for modification of its outstanding radio station licenses so as to add thereto authority to provide direct radiotelegraph communication between the United States and The Netherlands and Portugal. These are countries which Mackay already serves indirectly. The statutory standard governing Commission action upon such applications is set forth in Section 309(a) of the Communications Act of 1934, as amended, the pertinent part of which reads as follows:

> "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal or modification thereof in accordance with said finding."

The elements for Commission consideration in construing and applying the statutory standard are not detailed in the Act. The standard of "public interest, convenience, or necessity" is one which Congress has adopted where it does not wish to establish an inflexible rule of thumb, but

rather intends to impose upon the regulatory body responsibility for the exercise of judgment, in the light of specialized knowledge and experience, applied to the facts and conditions as they may exist and change.

As this Court said with regard to the statutory standard in *FCC* v. *Pottsville Broadcasting Company*, 309 US 134, 138 (1940):

> "While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. . . . The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."

Compare to the same effect *Board of Trade of Kansas City* v. *United States*, 314 US 534 at 546 (1942). Accordingly, it was the duty of the Commission "to find the facts and, in the exercise of a reasonable judgment, to determine that question". *Chesapeake and Ohio Railway Co.* v. *United States*, 283 US 35, 42 (1931).

The Commission, after extensive proceedings and a thorough analysis and consideration of the record and the contentions of the various parties, concluded from its factual findings that "public interest, convenience or necessity would be served" by a grant of petitioner's applications to communicate directly with The Netherlands and Portugal in full competition with RCAC's radiotelegraph facilities (R 550-632).

The national policy in favor of competition, as opposed to monopoly, was deemed by the Commission an important factor in determining the "public interest", at least in cases where the facts show that competition "is reasonably feasible" in that the volume of traffic available between the points in question is sufficient to support radiotelegraph services by both the present carrier and the new carrier (R 623-30).

The Commission placed emphasis on the fact that RCAC had a monopoly of the direct radiotelegraph communications to The Netherlands and Portugal, and that the licensing of direct circuits to petitioner would not only improve the then existing indirect service of Mackay and its affiliate Commercial Cable, but would also introduce competition in direct communication with the points in question (R 605, 628) at a nominal cost to Mackay (R 54, 56-8, 221-2, 231, 543).

The Commission explained from its experience in the field of international communications the importance of direct circuits for effective competition, noting the trend in the past ten years from cable to radio (R 620). It said that operation of direct circuits is an important factor in appealing for customer patronage, and tends to improve the carrier's ability to secure inbound traffic, which in turn is claimed to enhance the ability to develop outbound traffic (R 626). It pointed out that neither RCAC nor Western Union had suggested that Mackay should not be permitted to handle traffic to the points involved via its *indirect* routes such as Lima or London, that the Commission does not confine a carrier to traffic to those points to which it is licensed to operate direct circuits, and that practically all of the international cable and radio carriers handle traffic to many points to which they do not have direct facilities.

It further pointed out that the existing competition by indirect circuits (whereby Mackay operates to Portugal through Peru and to The Netherlands through London) is less efficient and desirable, entailing extra handling through relay points and slower service (R 626).

> "It is difficult to find [said the Commission] that the public would benefit from an action on our part which would operate to forbid competition between radiotelegraph carriers except through indirect circuits."

The Commission warned that its discussion with respect to competition should not be interpreted as an indication that the Commission would be required in all cases to grant an application where the effect thereof would be additional competition. Note that the petitioner's Surinam application was denied (p. 5 above). The Commission stated, however, that competition "is an important element in a determination of whether the public interest, convenience, or necessity would be served" by the granting of an application presented to the Commission (R 627).

In fact, the Commission concluded, the adoption of a single as opposed to a duplicate circuit policy, which RCAC urged upon it, would not only violate the spirit of the Communications Act and contravene the national policy condemning monopoly, but would also accomplish what Congress has so far refused to permit by way of merger legislation (R 627-8).[3] The Commission's decision was not based upon any theory that competition is desirable just for the sake of having competition, but treated in great detail

---

[3]Congress has never authorized the Commission to permit mergers of international telegraph carriers, including radio, although numerous proposals have been presented to it (R 624).

all of the elements involving the effects of the proposed competition upon the public and the parties in this particular case.

Its comprehensive opinion traces in detail the rise and spread under its supervision of radiotelegraph competition between petitioner Mackay and respondent RCAC. Upon its organization in 1919 Radio Corporation of America, which owns all of the stock of RCAC, acquired the assets in the United States of Marconi Wireless Telegraph Company of America, an American company controlled by the British Marconi interests (R 558, 560). Before 1929, when Mackay entered the field, Radio Corporation of America had established direct radiotelegraph circuits between the United States and Hawaii, Great Britain and six other foreign countries (R 560). Radio Corporation of America at that time had a monopoly of radiotelegraph communication with foreign centers. In 1929 Mackay's first trans-oceanic circuits were opened to Hawaii and Peru (R 561).[4] By the time of the organization of the Federal Communications Commission in 1934, Mackay had 18 circuits with overseas countries in operation or authorized, and RCAC (which had taken over from its parent) had 40 circuits in operation (R 560-1).

Under the regime of the Commission, with varying policies by the Board of War Communications during 1942-5 as to the establishment of duplicate circuits to foreign countries, additional circuits were authorized for both companies, so that at the time of the hearings before the Commission herein RCAC had 65 circuits and Mackay 39 circuits

[4] Its predecessor, Federal Telegraph Company, inaugurated the first trans-ocean circuit when in 1912 it operated between California and Hawaii (R 42-3).

with points throughout the world (R 560-2). This growth of Mackay competition did not go unopposed. Not only did RCAC resist before the Commission the authorization of duplicating circuits to Mackay (as in the instant case and in the *Oslo* case, referred to at pages 5-6 above), but it worked out exclusive contracts with its foreign correspondents prohibiting them from dealing with any other United States carrier (R 562-3). Negotiations begun by Mackay with The Netherlands as early as 1931, and similar negotiations with Portugal, were frustrated by these exclusive RCAC contracts (R 40-5, 82-5, 495, 562-3). An amendment in 1935 to the consent decree in the United States District Court for Delaware in *United States* v. *Radio Corporation of America* enjoined RCAC from employing certain exclusive provisions in contracts with foreign correspondents (R 44, 562). In 1943, the Commission itself took action to obtain a waiver by RCAC of contract provisions requiring its foreign correspondents to send all unrouted traffic over circuits of RCAC (R 563).

The Commission concluded that the public interest would be served by opening up The Netherlands and Portugal circuits to direct competition (R 563, 606-7, 631), upon findings that Mackay is legally, financially and technically qualified and able to provide adequate service to the points at issue (R 605, 615, 628), and that the proposed action would not endanger the ability of either RCAC or Western Union to continue to render competitive international telegraph service to such points (R 607, 614, 628-9). The record shows that the estimated additional expense to be incurred by reason of the opening of Mackay's new direct circuits approximates $15,000 in the case of The Netherlands and less than $6,000 for the proposed

operation to Portugal (R 54, 56-8, 221-2, 231, 543). The Commission also found that a grant of petitioner's applications, while resulting in some decrease in cable competition, would increase over-all competition for telegraph traffic generally and would introduce more effective competition between the radiotelegraph carriers serving the points involved.

With respect to improvement in service, the Commission found:

> "... the speed of service proposed to be rendered by Mackay in transmission between New York and Amsterdam ... would be better than that rendered by Commercial or by Mackay over any indirect circuit that it could use" (R 576, 605-606).

Further, the Commission found as to Portugal:

> "... Mackay's proposed direct radio circuit would provide faster and more accurate service than that provided by cable via the Azores where manual relays are involved and faster and more accurate service than that provided by Mackay via Lima where manual relays are also involved" (R 596, 605).

RCAC did not challenge these findings of the Commission, which are fully supported by the record, but urged that the Commission erred in granting petitioner's applications because of its finding that the record did not show that petitioner's proposed direct service *would be superior* to that provided by RCAC. Obviously this is a fact which experience alone can prove or disprove. RCAC's position is merely a restatement of the Commission's recognition of the fact that since RCAC has the only direct radiotelegraph circuit, a competitive carrier having only indirect